Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1978

No. 78-1897

HAK YUNG SZE,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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—v.—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioner Hak Yung Sze respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in this action on May 31, 1979, affirming a judgment of conviction rendered by the United States District Court for the Southern District of New York, which was entered on March 7, 1979.

Opinions Below

The oral opinion of the Court of Appeals for the Second Circuit is unreported. The opinion of the United States District Court for the Southern District of New York, not yet reported, appears in the Appendix hereto.

Jurisdiction

The judgment of the Court of Appeals for the Second Circuit was entered on May 31, 1979. This petition for certiorari was filed within 30 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

Questions Presented

1. Whether the petitioner's attack in a criminal prosecution under 8 U.S.C. § 1326 on the manner of execution of the underlying order of deportation was equivalent to a collateral attack on the order of deportation itself, where the petitioner does not attack the validity of such order, and hence whether his attack should be precluded.

2. Whether the failure of the Immigration and Naturalization Service to follow its express mandatory regulations requiring that a deportable alien be served with the prescribed notice of deportation, and of the criminal penalty inherent in his unauthorized reentry into the United States, 8 U.S.C. § 1326, denied the petitioner a due process right.

Statutes and Regulations Involved

8 U.S.C. § 1326 *Reentry of Deported Alien*

Any alien who —

> (1) has been arrested and deported or excluded and deported, and thereafter
>
> (2) enters, attempts to enter, or is at any time found in the United States, unless (a) prior to his reembarkation at a place outside the United States or his application for admission from foreign contiguous territory, the Attorney General has expressly consented to such alien's reapplying for admission; or (b) with respect to an alien previously excluded and deported, unless such alien shall establish that he was not required to obtain such advance consent under this chapter or any prior Act,

Shall be guilty of a felony, and upon conviction thereof, be punished by imprisonment of not more than two years, or by a fine of not more than $1,000.00 or both.

INS Operations Instructions, § 243.2(f)
Notice to Deportees

When a warrant of deportation is issued and the country of deportation has been determined, the alien shall be notified on Form I-294 of the country to which he shall be deported. If the Form I-294 is served personally, that fact shall be noted on the file copy of the form by the officer making service. In the event service is made by mail, "Certified Mail—Return Receipt Requested" is to be utilized, and the return receipt attached to the file copy of Form I-294. When completely ready for deportation, the alien, if not detained, shall be served with Form I-166, requiring him to surrender in not less than 72 hours.

Statement of the Case

The petitioner was convicted under § 276 of the Immigration and Nationality Act of 1952, as amended, 8 U.S.C. § 1326, upon a single-count indictment charging that:

> On or about the 17th day of October, 1978, HAK YUNG SZE, the defendant, was found in the United States in the Southern District of New York, being there unlawfully, willingly, knowingly, and without the express consent of the Attorney General to reapply for admission, and being then and there an alien who had been arrested and de-

ported from the United States on or about March 21, 1972 and again on May 15, 1976.

On December 22, 1978, subsequent to the filing of the indictment, a written stipulation was entered by and between the petitioner, his attorney, and the United States Attorney for the Southern District of New York on behalf of the United States. This stipulation together with appendages thereto was incorporated into the opinion of the court below.

The petitioner is an alien and a Chinese citizen. He first entered the United States at New Orleans on March 16, 1972 with a Conditional Landing Permit, based upon his status as a crewman aboard the M/V Newhaven. Two days later, the petitioner was arrested at the New Orleans airport by agents of the Immigration and Naturalization Service (hereafter "INS") after attempting to purchase a one-way plane ticket to New York City. Upon the arrest of the petitioner, a fellow crewman advised him that his conditional landing permit had been revoked, that his deportation had been ordered, and that he would be guilty of a felony upon subsequent entry or attempted entry into the United States without permission of the Attorney General. The INS agents returned the petitioner to the M/V Newhaven and notified the persons in charge of the vessel that he was to be detained on board and deported.

On September 12, 1972, the petitioner was arrested in New York City by agents of the INS, and after being advised of his rights, the petitioner executed a sworn statement describing his entry into the United States from Canada in July of 1972. On November 21, 1972, a warrant of deportation was issued, and the same day the INS mailed to the petitioner, pursuant to § 243.2(f) of its mandatory Operations Instructions, the required notice to the petitioner that he had been ordered deported and

that any deported person who subsequently enters or attempts to enter the United States is guilty of a felony ("Form I-294"). However, the INS did not, as required by the aforesaid regulation, send the Form I-294 by "Certified Mail—Return Receipt Requested", which is the only available alternative to personal service. As noted by the District Judge, there is no proof that the petitioner actually received the notice (Opinion of the District Court, Appendix, p. A-2).

On December 11, 1972, the petitioner presented an application for political asylum and stay of deportation to the INS. The request for asylum was denied, and the stay of deportation was granted pending litigation. Upon termination of the litigation, the outstanding warrant of deportation was executed, and the petitioner was deported to Hong Kong. On October 17, 1978, the petitioner was arrested after having entered the United States on December 25, 1976, without the express consent of the Attorney General.

Following a bench trial upon the stipulated facts, the District Court found the petitioner guilty of the crime charged under 8 U.S.C. § 1326, whereupon the petitioner filed a timely notice of appeal to the United States Court of Appeals for the Second Circuit, which affirmed the judgment of the District Court without formal written opinion.

Reasons for Granting the Writ

1. This is a case of first impression, addressing the question of whether an alien under criminal prosecution for reentering the United States after being arrested and deported (8 U.S.C. § 1326) may raise the lawfulness of the manner in which he was deported, though not attacking the order on its face. In addition, the circuits are divided on the issue of whether the underlying deportation order itself may be attacked collaterally in a criminal action under § 1326.

It is an element of the offense under § 1326 that the defendant have been "arrested and deported" prior to reentering the United States. While the statute does not describe the manner of deportation, leaving the interstices to the Immigration and Naturalization Service (INS), the interpretation of the statutory term "arrested and deported" is a question of law, which is ultimately determined by the judiciary. Accordingly, several of the circuits have held that the intent of Congress when it used the word "deported" was that the deportation be according to law, and therefore that the lawfulness of the deportation is an essential ingredient of the statutory offense under § 1326. *United States* v. *Gasca-Kraft*, 522 F.2d 149, 152 (9 Cir. 1975); *United States* v. *Bowles*, 331 F.2d 742, 749 (3 Cir. 1964); *United States* v. *Heikkinen*, 221 F.2d 890, 892 (7 Cir. 1955).

There is some authority permitting collateral attack of the deportation order itself. Whereas the Fifth and Tenth Circuits have denied such an attack, *United States* v. *Gonzalez-Parra*, 438 F.2d 694 (5 Cir. 1971), *cert. denied*, 402 U.S. 1010 (1972), *Arriaga-Ramirez* v. *United States*, 325 F.2d 857 (10 Cir. 1965), the Third, Seventh, and Ninth Circuits have allowed review of the prior deportation order. *United States* v. *Bowles*, *id.* at 750; *United States* v. *Heikkinen*, *id.* at 892; *United States* v. *Barraza-Leon*, 575 F.2d 218, 220 (9 Cir. 1978) (citing *United States* v. *Gasca-Kraft*, *id.* at 152-53). Most recently the Second Circuit, in *United States* v. *Pereira*, 574 F.2d 103 (2 Cir. 1978), *cert. denied*, 99 S.Ct. 145 (1978), did not preclude all collateral attack but instead affirmed a conviction under § 1326 on the basis of the defendant's "continuing and flagrant disregard of the Immigration Laws of the United States, ... without deciding whether, under *other* circumstances, a collateral attack on a deportation order might be permissible in a § 1326 proceeding." 574 F.2d at 106 (Italics the Court's).

The instant case is not within the scope of *Pereira*, since the petitioner is in no wise attacking the grounds for his order of deportation. Rather, he asserts that the deportation procedure was unlawful in that the INS failed to serve him properly with the required *Notice to Deportees* pursuant to § 243.2(f) of its Operations Instructions, which contains notice of the criminal penalty imposed for unauthorized reentry. *See* Point 2, *infra*. The petitioner's attack is therefore not upon the judgment of deportation but upon the execution of the judgment.

The opinion of the District Court indeed did not seem to preclude the petitioner's attack, although it discussed *Pereira* extensively. Instead, the court found sufficient constructive notice of the deportation in that the petitioner had motioned to stay the execution of the warrant. But as to how knowledge of the criminal penalty could be imputed to the petitioner, the record is silent. Lacking actual notice, the court below could not impute guilty knowledge to the petitioner of the fact that a subsequent unauthorized entry would result in criminal liability. Since deportation proceedings are civil in nature, the petitioner could not have suspected that he was committing a crime. *See* Point 2, *infra*.

Because the petitioner was not properly served with the required *Notice to Deportees*, the arrest and indictment in the instant action was the first knowledge he had of the offense under § 1326. Therefore, the criminal action was the first chance he had to raise the objection that he knew nothing of the criminal nature of his conduct at the time he reentered the United States. To deny the opportunity to raise the issue is to deny the opportunity to be heard, for once he was physically deported, he had no administrative forum in which to object to the failure of the INS to properly serve him with notice as required by its mandatory regulations.

Furthermore, since the notice procedure was required by regulation, it had the force and effect of law and the

INS was thus bound to follow it. *See* Point 2, *infra*. The proper execution of the order of deportation is thus inescapably related to the lawfulness of the deportation, and it therefore becomes a material element of the offense defined by § 1326. Because interpretation of the statutory term "arrested and deported" is a question of law and so falls within the scope of judicial review, and because the criminal proceeding was the first opportunity at which the petitioner could raise the objection of lack of proper service of notice of the criminal penalty, the attack on the manner of execution of the order of deportation should not be precluded.

2. The decision below should be reviewed because it conflicts with the decisions of this Court requiring an agency or department of government to follow the rules and regulations it has promulgated for the protection of a person against whom the underlying statute is to be enforced, whether or not these are mandated by statute or by the Constitution. *United States* v. *Nixon*, 418 U.S. 683 (1974); *Morton* v. *Ruiz*, 415 U.S. 199 (1974); *Yellin* v. *United States*, 374 U.S. 109 (1963); *Vitarelli* v. *Seaton*, 359 U.S. 535 (1959); *Service* v. *Dulles*, 354 U.S. 363 (1957); *United States ex rel. Accardi* v. *Shaughnessy*, 347 U.S. 260 (1954); *Bridges* v. *Wixon*, 326 U.S. 135 (1945).

All of the foregoing cases rested on a fundamental concept of due process, whether or not they specifically invoked the Due Process Clause: that where a procedural safeguard is enacted by the administrative rulemaking process, it cannot be disobeyed for the sake of administrative expediency. The *Accardi* case, for example, held squarely that as long as the regulation remains operative, the agency is bound by it as a rule of law. 347 U.S. at 267. In the instant case, the INS has failed to observe a procedural safeguard conferred by regulation on aliens subject to deportation procedures. The effect of this breach was necessarily to render the deportation unlawful.

Especially in light of the fact that aliens' rights are concerned should the Court review the decision below. Aliens are as a matter of law entitled only to such due process that is specifically granted by statute or by regulation. *United States ex rel. Knauff* v. *Shaughnessy*, 338 U.S. 537 (1950). Precisely because these safeguards are so limited should they be all the more strictly enforced. Accordingly, this Court has held, in cases involving appeals from deportation decisions, that where procedural safeguards are enacted by the INS which are designed to afford aliens due process of law, these regulations are binding on the INS. In *Bridges* v. *Wixon*, *id.*, the Court vacated an order of deportation where the INS took statements from witnesses in noncompliance with a Service regulation requiring that such statements be sworn and made under oath. In *Accardi* v. *Shaughnessy*, *id.*, the Court invalidated an order of the Board of Immigration Appeals denying an alien's application for suspension of deportation where the Attorney General had overreached the discretionary authority delegated by regulation to the Board. In each of the foregoing cases, there was no statutory or constitutional requirement for the regulations enacted by the INS, but the Court nonetheless enforced them on due process grounds.

The *Accardi* case clearly requires that an alien must at least be "afforded that due process required by the regulations in such proceedings," and that this is "nothing more than what the regulations accord the petitioner as a right." 347 U.S. at 268. Even though the Attorney General in that case had the final power to deport the petitioner, yet "as long as the regulations remain operative, the Attorney General denies himself the right to sidestep the Board or to dictate its decision in any matter." 347 U.S. at 267.

By virtue of this strong precedent should the decision below be reviewed, because here the INS has violated a procedural safeguard required by its own regulations.

Under § 243.2(f) of its Operations Instructions, the INS must, following the issuance of a warrant of deportation, notify the alien on a specific form which must be either served personally or mailed by "Certified Mail—Return Receipt Requested". If served personally, the officer making service is to note that fact on the file copy of the form, as the equivalent of an affidavit of service. If sent by certified mail, the return receipt is to be attached to the file copy, as an alternative proof of service. With either method, proof of service is required. Neither was done in the instant case.

The foregoing procedure serves two important functions. First, it assures that the alien has actual written notice that he is to be deported and of the country whereto. Secondly, the *Notice to Deportees* warns him in writing that future unauthorized reentry into the United States is a crime punishable by fine or imprisonment or both. This warning is the only warning the deportee receives that unauthorized reentry is a crime. § 1326 does not codify a common law crime nor does it require a specific criminal intent, and since deportation proceedings are civil in nature and carry no criminal penalties, there is no probability that a returning alien, absent express notice by the INS, would suspect that his conduct was criminal in nature. Indeed, this Court has held that where a statute punishes conduct which would not under ordinary probability be known as criminal, it is incumbent upon the governmental authority to provide adequate notice. *Lambert* v. *California*, 355 U.S. 255 (1957). The importance of this rule is underscored where the defendant is an alien: a person neither familiar with American law nor thoroughly conversant with the English language.

Accordingly, the criminal sanction predicated upon an order of deportation compels the INS to adhere to the notice procedure uniformly, invariably, and without ex-

ception. Improper service of this notice is a denial of a due process right afforded aliens subject to deportation procedures. This is so even absent a statutory requirement that the alien be notified of his pending deportation or of the penalties inherent in his reentry. As was held in *United States ex rel. Bilokumsky* v. *Tod*, 263 U.S. 149, 155 (1923), "one under investigation with a view to deportation is legally entitled to insist upon the observance of rules promulgated by the Secretary pursuant to law." Likewise, the decisions stemming from *Bridges* v. *Wixon* require that once a procedural safeguard is enacted, it is binding upon the agency until it is repealed. There can be no due process if it is ignored where the agency so chooses.

Furthermore, the decisions of this Court have not required, as did the District Court in the instant case, that the petitioner have been prejudiced in order to enforce a procedural safeguard enacted for his protection. Rather, it is the potential for prejudice and irreversible harm that mandates strict adherence to procedural safeguards. Nevertheless, the petitioner in the instant case was indeed prejudiced by the lack of notice of the crime of reentry under § 1326. Since the INS enacted a regulation requiring that all deportable aliens receive such notice, the arbitrary decision not to follow the regulation places an alien not so warned at a distinct disadvantage before the law. The petitioner has been so disadvantaged. It is therefore not only the potential but the actual occurrence of this harmful result that makes it imperative that the courts meticulously enforce the procedural safeguard.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

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Dated: June 18, 1979
New York, New York

APPENDIX

Opinion of John M. Cannella, District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
78 Cr. 744

UNITED STATES OF AMERICA

—against—

HAK YUNG SZE,

Defendant.

CANNELLA, *D.J.:*

After a bench trial on stipulated facts, the Court finds the defendant guilty of illegal re-entry into the United States after he had been arrested and deported. 8 U.S.C. § 1326.

On December 21, 1978, the defendant, after consultation with his attorney and after being advised of his right to a jury trial by the Court, waived his right to a trial by jury. On December 22, 1978, the defendant, his attorney and the Government entered into and filed a stipulation of facts in lieu of a trial. That stipulation and the attached exhibits are hereby incorporated into this Opinion.

FACTS

The defendant is an alien and a Chinese citizen. He first entered the United States on March 16, 1972, at New Orleans as a crewman aboard the M/V Newhaven. Two days later, he was arrested by agents of the Immigration and Naturalization Service ("INS") at the

New Orleans airport where he had attempted to purchase a one-way plane ticket to New York City. The INS agents returned the defendant to the M/V Newhaven and the persons in charge of the vessel were advised that the defendant was to be detained on board and deported. The defendant was notified that his deportation had been ordered and that he would be guilty of a felony if he entered the United States without the permission of the Attorney General.

The defendant remained on the M/V Newhaven until it docked at Montreal, Canada on July 17, 1972. On that day, the defendant and a fellow crewman left the ship and proceeded to the Peking Restaurant in Montreal. From the restaurant the defendant and his friend were directed to a Montreal hotel. After remaining in the hotel for two days, they approached the person in charge of the hotel who advised them that he could arrange for their entry into the United States and that the fee for this service would be $500 each.

At approximately 4:00 a.m. on July 22, 1972, the defendant and his companion met two other men in the hotel lobby. After paying these men $1,000, the defendant and his friend entered an automobile with them and were driven to New York City.

On September 12, 1972, INS agents arrested the defendant in New York City. After being advised of his constitutional rights, the defendant executed a sworn statement describing his entry into the United States from Montreal.

On November 21, 1972, the INS mailed the defendant "Form I-294" advising him that he had been ordered deported to Hong Kong and that he would be guilty of a felony if he returned to the United States without permission. Other than the fact that this notice was mailed to the defendant, there is no proof that he actually received it. Also on November 21, 1972, a warrant for the deportation of the defendant was issued.

On December 11, 1972, the defendant presented an application for political asylum and stay of deportation to the INS. The request for asylum was denied; the stay of deportation was granted pending litigation. During this litigation, the defendant was represented by counsel. When the litigation terminated, three and one-half years later, the outstanding deportation warrant was executed, and on May 15, 1976, the defendant was deported to Hong Kong.

Six months later, on December 25, 1976, the defendant again entered the United States at New York City's Kennedy Airport, using a passport and visa bearing a fictitious name, which he had purchased in Hong Kong for $2,000. On October 17, 1978, INS agents once again arrested the defendant, in Manhattan. At no time did the defendant apply for or receive the consent of the Attorney General to apply or reapply for admission to the United States.

DISCUSSION

The defendant's sole contention in this litigation is that his deportations, from New Orleans on March 21, 1972, and from New York on May 15, 1976, were unlawful and that they may not, therefore, form the predicate for his conviction of the instant offense.

Initially, the Court notes that there is authority in this circuit for the proposition that a defendant may not collaterally attack a deportation order in a criminal prosecution under 8 U.S.C. § 1326. *See* United States v. Mohammed, 372 F. Supp. 1048 (S.D.N.Y. 1973). In a recent case, the Second Circuit declined to foreclose such collateral attack entirely, but nonetheless affirmed a conviction on the facts before it. United States v. Pereira,

574 F.2d 103 (2d Cir. 1978). In that case, the defendant was convicted by the Connecticut state court on a plea of guilty to burglary, theft and escape. Before the defendant's term of imprisonment for the state offenses was completed, he was ordered deported by the INS under a statute which provides for the deportation of aliens convicted of crimes involving moral turpitude. After a subsequent entry into the United States in 1975, the defendant was indicted for unlawful entry under 8 U.S.C. § 1326. Thereupon, the defendant moved to dismiss the indictment claiming that his 1965 conviction was invalid because his guilty plea was involuntary. The district court denied the motion, holding that such collateral attack was foreclosed. Thereafter, on September 20, 1977, the defendant entered a plea of guilty, reserving his right to appeal the district court's denial of his motion to dismiss the indictment.

On appeal, the conviction was affirmed. The Second Circuit found that the defendant "made no direct or collateral challenge in the Connecticut state courts to the voluntariness of his plea or the validity of the resultant conviction." 574 F.2d at 105. Additionally, the court noted that "[h]ad any suggestion or claim been made in the intervening years that these convictions were suspect, the INS unquestionably could have obtained Pereira's deportation as an alien who had been arrested and previously deported." 574 F.2d at 106. The Second Circuit found that these facts established that the defendant had "displayed a continuing and flagrant disregard of the Immigration Laws of the United States." *Id.*

In the instant case, the defendant claims that the November 1972 deportation order and his 1976 deportation pursuant to that order were invalid because there is no proof that he received the notice of deportation and warning of the consequences which was mailed to him on

November 21, 1972. In his submission to this Court, the defendant does not deny that he received the notice, but rather asserts that the Government did not prove that he did. The notice that was mailed advises the defendant that he had been ordered deported and that, were he to return to the United States without permission, he would be guilty of a felony. It is printed in five different languages: English, Spanish, Portuguese, Greek and Chinese.

That defendant had notice that he had been ordered deported is established not only by the fact that he moved to stay this order on December 11, 1972, but also by the fact that he was actually deported on May 15, 1976. Defendant's knowledge that a subsequent entry was unlawful is established by the surreptitious manner in which he entered the United States. Accordingly, the defendant was not prejudiced, even if the Court assumes he did not receive the "Form I-294." Moreover, had defendant made any suggestion of lack of notice during the three and one-half years that he litigated the deportation order, the INS would have given him a form at that time. Finding defendant's 1976 deportation lawful, the Court need not pass upon the legality of his March 1972 deportation from New Orleans.

CONCLUSION

The Court finds that the defendant Hak Yung Sze, on October 17, 1978, was found in the United States in Southern District of New York, being there unlawfully, willfully, knowingly and without the express consent of the Attorney General, to apply or reapply for admission, being then and there an alien who had been arrested and deported from the United States on May 15, 1976. Accordingly, the defendant is guilty of the crime charged in the indictment. 8 U.S.C. § 1326.

The defendant is ORDERED to report immediately to the office of the United States Probation Department in the Southern District of New York for presentence investigation and to appear for sentence on April 12, 1979, in courtroom 1506. Present bail conditions are continued.

SO ORDERED.

/s/ JOHN M. CANNELLA
JOHN M. CANNELLA
United States District Judge

Dated: New York, N.Y.
March 7, 1979.